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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

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**CRYSTAL MASON,**
**Appellant,**

**v.**

**STATE OF TEXAS,**
**Appellee.**

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From the Second Court of Appeals,
Cause No. 02-18-00138-CR

Trial Court Cause No. 1485710D
From the 432nd District Court of Tarrant County, Texas
The Honorable Ruben Gonzalez, Jr. Presiding

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# BRIEF OF *AMICI CURIAE* ELECTION LAW SCHOLARS IN SUPPORT OF APPELLANT CRYSTAL MASON

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## STATEMENT OF INTEREST OF THE *AMICI CURIAE*

*Amici* are election law scholars whose areas of expertise include federal election law.

**Guy-Uriel E. Charles** is the Charles J. Ogletree Jr. Professor of Law at Harvard Law School where he is also the Faculty Director of the Charles Hamilton Houston Institute for Race and Justice. He teaches and writes about election law, constitutional law, and voting rights. He has been involved as an amicus in several cases involving election law and voting rights.

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**Joseph Fishkin** is a Professor of Law at UCLA who specializes in election law and constitutional law, among other areas. From 2010 to 2021, he taught at the University of Texas School of Law, where he was the Marrs McLean Professor in Law. He has written several articles about the rights of individual voters in the

American election system. Professor Fishkin has participated as an amicus in several cases addressing important questions of election law and/or federalism.

**Luis Fuentes-Rohwer** is the Class of 1950 Herman B. Wells Endowed Professor at the Indiana University Maurer School of Law. He teaches and writes in the areas of voting rights, legal history and race. He is the co-author of an upcoming book about the history of race and voting in the United States. Professor Fuentes-Rohwer has participated as an amicus in previous cases involving election law, voting rights, and constitutional law.

**Spencer Overton** is a Professor of Law at George Washington Law School who specializes in voting rights. He is the author of the book *Stealing Democracy: The New Politics of Voter Suppression* and several academic articles on voting rights. He served as Principle Deputy Assistant Attorney General in the Office of Legal Policy at the U.S. Department of Justice, where he co-chaired the Attorney General's Reentry and Reducing Recidivism Issue Team and collaborated with White House officials to lead policy efforts related to the Military and Overseas Voter Empowerment Act, the National Voter Registration Act, and the Voting Rights Act. Professor Overton's work on the Commission on Presidential Nomination Timing and Scheduling resulted in Iowa restoring voting rights to 98,000 returning citizens. He has participated as an amicus in several voting rights cases.

**D. Theodore Rave** is a Professor of Law at the University of Texas School of Law, where he specializes in election law and constitutional law among other areas. From 2013 to 2021, he taught at the University of Houston Law Center, where he was the George A. Butler Research Professor. He has written several articles about voting and democracy in the United States, and has participated as an amicus in several cases addressing election law and other issues.

**Douglas Spencer** is an Associate Professor of Law at the University of Colorado who specializes in election law and constitutional law among other areas. From 2013-2021, he was Professor of Law and Public Policy at the University of Connecticut. He has written several articles on the role of prejudice and racial attitudes in voting rights and the ways that election rules and political campaigns contribute to growing inequality in America. Professor Spencer has participated as an amicus in several voting rights and election law cases, and has served as an expert in federal Voting Rights Act litigation.

**Franita Tolson** is Vice Dean for Faculty and Academic Affairs and Professor of Law at USC Gould School of Law. As a nationally recognized expert in election law, her work has been published in leading law reviews and in various mass media outlets. She is one of the co-authors of the leading election law casebook, *The Law of Democracy*, as well as the author of the forthcoming book, *In Congress We Trust?: Enforcing Voting Rights from the Founding of the Jim Crow Era.* In addition

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**Stephen I. Vladeck** is the Charles Alan Wright Chair in Federal Courts at the University of Texas Law School. He is a nationally recognized expert on the federal courts, constitutional law, and national security law. He is an elected member of the University of Texas Faculty Council, an elected member of the American Law Institute, a Distinguished Scholar at the Robert S. Strauss Center for International Security and Law, and the Supreme Court Fellow at the Constitution Project. Professor Vladeck's scholarship has included work at the intersection of election law and constitutional issues, and he has participated as an amicus in multiple cases arising at that intersection.

No fee has been paid or will be paid by *Amici* or by any of the parties for the preparation of this brief. TEX. R. APP. P. 11. *Amici* counsel are providing their services pro bono.

## SUMMARY OF THE ARGUMENT

In November 2000, millions of Americans seeking to vote in the federal election were turned away from the polls without being allowed to cast a ballot. To restore the integrity of the American electoral system after the ensuing political crisis, Congress enacted the bi-partisan Help America Vote Act of 2002 (HAVA) and established a federal right to cast a provisional ballot in federal elections. *See* 52 U.S.C. § 21082(a). Subjectively believing that she was eligible to vote, but not appearing on the voter list at her precinct, Appellant Crystal Mason was offered, and cast, a provisional ballot in the November 2016 general election in accordance with HAVA.

In processing her ballot, local election officials subsequently determined that Ms. Mason was not an eligible voter under Texas law, as she was on federal "supervised release" following a period of incarceration for a federal felony conviction. Accordingly, Ms. Mason's provisional ballot was not counted. Again, these steps followed the process required under HAVA.

The State then chose to prosecute Ms. Mason for the crime of illegal voting under TEX. ELEC. CODE § 64.012(a)—and here, it broke sharply and irreconcilably with the provisions and purpose of HAVA. In HAVA, Congress created a federal statutory right to encourage individuals not appearing on the voter list to cast a provisional ballot, and a state's imposition of criminal penalties under state law for

the good-faith exercise of that right is inimical to the federal statute. The appellate court, however, concluded that Ms. Mason violated the Texas statute even though there was no evidence that she intended to defraud the state by casting her provisional ballot. If the court's interpretation of the Texas Election Code were correct, then the statute directly conflicts with HAVA and is therefore preempted under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, in which case Ms. Mason's conviction must be overturned.

The serious tension between Ms. Mason's conviction and the federal regime enacted in HAVA strongly favors interpreting the "illegal voting" provision of Texas law to authorize prosecution only where an individual casts a provisional ballot with the subjective belief that he or she is actually prohibited from voting. A different construction will impermissibly chill countless potential voters and violate the congressional intent to provide a robust federal right to cast a provisional ballot. Because the appellate court found that it did not matter whether Ms. Mason actually believed that she was ineligible to vote under Texas law, this Court should reverse Ms. Mason's conviction.

## ARGUMENT

### I. Introduction.

Texas defines the crime of "illegal voting" as "vot[ing] or attempt[ing] to vote in an election in which the person knows the person is not eligible to vote." TEX. ELEC. CODE § 64.012(A)(1). Ms. Mason was convicted and sentenced to five years in prison. On appeal, the appellate court acknowledged that "[t]he evidence does not show that [Mason] voted for any fraudulent purpose." *Mason v. State*, 598 S.W.3d 755, 779 (Tex. Ct. App. 2020). Indeed, Ms. Mason appears to have had a good-faith, albeit mistaken, belief that she was eligible to vote in the November 2016 election.

HAVA explicitly contemplates what will happen when individuals who cast a provisional ballot in good faith are incorrect about their voter eligibility: their ballot will not be counted. 52 U.S.C. § 21082(a)(4). Nonetheless, in affirming her conviction, the appellate court held that under the Texas "illegal voting" law, it does not matter whether Ms. Mason intended to defraud or whether she otherwise subjectively knew that she was not an eligible voter. According to the court, "Texas law has long provided that to prove the commission of this offense, the State need only show beyond a reasonable doubt that the defendant voted while knowing of the condition that made the defendant ineligible." *Mason*, 598 S.W.3d at 768. Under this interpretation, "the State does not have to prove that the defendant subjectively knew that voting with that condition made the defendant ineligible to vote under the law or that to vote while having that ineligibility is a crime." *Id.* Therefore, "the fact that

[Mason] did not know she was legally ineligible to vote was irrelevant to her prosecution under Section 64.012(a)(1)." *Id*. at 770. Instead, the appellate court held, the State only needed to prove that Mason "voted while knowing she had been finally convicted of a felony and had not yet completed her supervised release." *Id*. As shown below, that holding directly conflicts with the statutory framework Congress enacted in HAVA, and should be set aside.

HAVA creates a federal right to cast a provisional ballot and where, as here, there is no subjective intent to defraud, the only consequence for casting a provisional ballot that turns out to be invalid for any reason is that the ballot will not be counted. HAVA was enacted in the wake of the 2000 presidential election that saw millions of voters turned away from the polls because their names were not on voter lists. To remedy the immense damage done to the integrity of the American electoral system, HAVA generally, and the provisional ballot requirements in particular, are intended to ensure that anyone who believes that they are eligible to vote may cast at least a provisional ballot on election day, regardless of whether the individual is listed on the eligible voter roll. HAVA responded to the reality that voter lists are imperfect, voter knowledge is imperfect, and sometimes there is doubt about who is eligible to cast a ballot even when everyone is acting in good faith. HAVA's legislative solution to this problem is to encourage voters who believe they are eligible to cast a *provisional* ballot. The provisional balloting procedures created

by HAVA prevent people from being turned away from the polls and gives election authorities time to determine the correct answer about whether the ballot should or should not be counted.

HAVA preempts the appellate court's construction of Texas's illegal voting statute. By penalizing an individual who exercises her right to cast a provisional ballot believing that she is an eligible voter, Texas law, as interpreted by the appellate court, imposes draconian state penalties on an individual who does nothing more than what Congress allowed her to do. Further, the Texas law, as interpreted by the appellate court, is inimical to HAVA because the threat of a five-year prison term for incorrectly casting a provisional ballot will unquestionably chill many voters from requesting such ballots once they are told at the polling place that they are not on the list of eligible voters. That is the very problem HAVA sought to fix.

## II. The Right To Cast A Provisional Ballot Is An Essential Part Of HAVA.

HAVA was enacted by overwhelming bipartisan majorities in response to the turmoil of the 2000 presidential election, in which "the American electoral system was tested by a political ordeal unlike any in living memory." JIMMY CARTER, ROBERT H. MICHEL, LLOYD N. CUTLER, PHILIP D. ZELIKOW, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS: REPORT OF THE NATIONAL COMMISSION ON FEDERAL ELECTION REFORM 1 (U.S. Brookings Institution Press

2002)[1] ("Task Force Reports"). President George W. Bush signed the statute into law in October 2002.

HAVA implemented many of the principles set out by the National Commission on Federal Election Reform ("National Commission"), which was created in the wake of the 2000 election to examine existing voting systems and recommend reforms to improve America's electoral system. The National Commission was co-chaired by former President Gerald Ford, former President Jimmy Carter, former House Minority Leader Robert Michel, and former White House Counsel Lloyd Cutler. In adopting the National Commission's recommendations, Congress intended "to make sweeping reforms to the nation's voting process." U.S. Election Assistance Commission, https://www.eac.gov/about_the_eac/help_america_vote_act.aspx (all websites in this brief were last visited on August 5, 2021).

Provisional ballots were a central focus of election reform efforts after the experience of the 2000 election. According to the National Commission's Task Force on the Federal System, "[t]he 2000 presidential election made abundantly clear that mistakes occur, mistakes that cause some eligible voters to be denied the right to vote and some ineligible citizens to believe they were denied the right to

[1] The National Commission on Federal Election Reform's report was originally published in 2001, and then published in book form for the first time in 2002. This brief cites to the 2002 book edition, and predominantly to its Chapter VII, entitled "Provisional Balloting."

vote." Task Force Reports at 186. The Task Force explained that provisional balloting struck an appropriate balance between two principles: first, that "honest administrative errors should not contravene a voter's right to participate in an election"; and second, that "false or mistaken claims of administrative error should not entitle a citizen to vote despite ineligibility." *Id.*

A comprehensive provisional ballot system addresses both concerns. First, because the official list of eligible voters used by poll workers often contains mistakes, a voter who should be on that list but is not may cast a provisional ballot at the precinct. Election officials can later determine whether the individual is in fact eligible and the vote should be counted. That way, would-be eligible voters are not turned away from the polls due to administrative errors, as happened in large numbers in 2000.

Second, individuals who incorrectly believe that they are eligible to vote but who are not listed on the voter roll will be given the opportunity to cast a provisional ballot, and upon inquiry by the election officials, their ballot will not be counted.

Prior to HAVA's enactment, Congress had recommended (but not required) broad adoption of provisional balloting systems in the National Voter Registration Act of 1993 (NVRA), Pub. L. No. 103-31 (107 Stat. 77). As of the 2000 election, however, only 19 States provided for provisional balloting. Task Force Reports at 187. Still, the experiences of the States that had adopted provisional balloting by

2000 showed that "[v]oter registration problems are common enough that substantial numbers of voters receive provisional ballots in each election." *Id*. at 190. Due to either voter error or election administration mistakes, "in every election, people appear at the polls who believe, quite reasonably, that they are legally registered to vote. But they are not on the rolls." *Id*. at 191. The Task Force continued that, "[b]ecause of the inevitability of errors," provisional balloting "help[s] to speed operations in the polling place," "make[s] it possible not to have to turn away voters at the polls," and "help[s] election administrators to catch voter registration mistakes." *Id*.

The National Commission recommended that every State should permit the casting of a provisional ballot "by any voter who claims to be qualified to vote in that [S]tate." *Id.* at 6. The use of a provisional ballot allows election officials "to defer resolution of arguments about eligibility, whether because people have moved, or claim they have no criminal record, or claim not to have received their absentee ballot, or because of other disputes." *Id*. at 36. This system serves the interest of easing election administration by giving poll workers "an easier option to handle angry, frustrated voters." *Id*. The use of provisional ballots also serves the interest

of "encourag[ing] every eligible voter to participate effectively" because voters are no longer turned away at the polls. *Id*. at 5, 19, 34.[2]

Congress adopted the consensus recommendations to include in HAVA a robust federal statutory right to cast a provisional ballot. Under HAVA, "[i]f an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office," but the individual's name does not appear on the voter roll or the election official "asserts that the individual is not eligible to vote," then that person "*shall be permitted* to cast a provisional ballot." 52 U.S.C. § 21082(a) (emphasis added). In other words, the statute is intended to "make sure that all citizens who show up to vote have the right to cast provisional ballots, so that their votes can be tabulated if and when their eligibility is verified." 148 CONG. REC. 4391 (Apr. 11, 2002) (statement of Sen. Lieberman). This broad right to cast a provisional ballot was one of the "major, major changes in the law," 148 CONG. REC. 4394 (Apr. 11, 2002) (statement of Sen. Dodd), and "a significant step toward improving the

[2] The National Commission was not alone in its recommendation that every State implement provisional ballot measures. Senator Dodd explained during the legislative debates that "[a]lmost every organization that has examined election problems has recommended the adoption of provisional voting." 148 CONG. REC. 4396 (Apr. 11, 2002) (statement of Sen. Dodd). For instance, a study by Caltech and MIT estimated that "the aggressive use of provisional ballots could cut the lost votes due to registration problems in half." *Id*.

integrity of the election system and making certain that every vote will count." 147 CONG. REC. H9294 (2001) (statement of Rep. Price).

HAVA details the steps required to effectuate this right. First, election officials are required to notify the individual not appearing on the voter rolls that the individual may cast a provisional ballot. 52 U.S.C. § 21082(a)(1). The individual "shall be permitted to cast a provisional ballot" at the polling place if they execute a written affirmation before an election official stating that they are a registered voter in the jurisdiction who desires to vote and is eligible to vote in the federal election. *Id*. § 21082(a)(2). The election official must then transmit "the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual" to the appropriate election official for verification. *Id*. § 21082(a)(3). If that official "determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law." *Id*. § 21082(a)(4).

At the time the individual casts a provisional ballot, the election official "shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain" under the State's "free access system" whether the ballot was counted and, if it was not counted, the reason why it was not counted. *Id*. § 21082(a)(5). Instructions on how to cast a provisional ballot must be posted at each polling place. *Id*. § 21082(b)(2)(C).

As a federal appellate court has explained the HAVA process, "because any given election worker may not in fact have perfect knowledge [about a would-be voter's eligibility], the person who claims eligibility to vote, but whose eligibility to vote at that time and place cannot be verified, is *entitled under HAVA* to cast a provisional ballot." *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 570 (6th Cir. 2004) (emphasis added). Then, "[o]n further review—when, one hopes, perfect or at least more perfect knowledge will be available—the vote will be counted or not, depending on whether the person was indeed entitled to vote at that time and place." *Id*.

Since 2006, millions of provisional ballots have been cast in federal elections. In the presidential election cycles of 2008, 2012, and 2016, approximately 1.8% of all ballots cast were provisional ballots, while approximately 1.1% of all ballots cast during midterm elections in 2006, 2010, and 2014 were provisional. In the six election cycles between 2006 and 2016, more than 10 million provisional ballots were issued, including more than 2.4 million provisional ballots cast in the 2016 election cycle. Between 2006 and 2016, approximately 2.4 million provisional ballots were rejected by election authorities and therefore not counted. *See generally* Election Assistance Comm'n, Election Administration and Voting Survey (EAVS), EAVS Deep Dive at 1-3, https:eac.gov/sites/default/files/document_library/files/EAVSDeepDive_provisionalballot.pdf.

In the 2018 midterm elections, more than 1.8 million people cast provisional ballots, and approximately 57% were counted. Drew DeSilver, *Most mail and provisional ballots got counted in past U.S. elections – but many did not*, PEW RESEARCH CTR. (Nov. 10, 2020), https://www.pewresearch.org/fact-tank/2020/11/10/most-mail-and-provisional-ballots-got-counted-in-past-u-s-elections-but-many-did-not.

## III. Texas Law As Construed By The Appellate Court Is Preempted.

The lower court's construction of Texas law to permit the imposition of a lengthy prison sentence on an individual who, acting in good faith and with no intent to defraud, availed herself of her federal right to cast a provisional ballot, cannot be squared with HAVA's text, structure, or history. If the appellate court's view of Texas state law were correct, then under well-established constitutional principles, such a construction would be preempted under federal law, requiring reversal of the conviction below. This square conflict is a strong reason why the Court should not construe Texas law in this manner. *See In re K.S.*, 448 S.W.3d 521, 530 (Tex. Ct. App. 2014) (holding that where possible state law should be interpreted in a manner that avoids preemption by federal law); *Ex Parte White*, 400 S.W.3d 92, 94 (Tex. Crim. App. 2013) ("it is desirable to construe a statute to avoid a potential constitutional violation"); *Lebo v. State*, 90 S.W.3d 324, 326 (Tex. Crim. App. 2002) ("statutory interpretation must also analyze laws to avoid, when possible,

constitutional infirmities"); *accord Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 19 (Minn. 2002) (explaining that the court should avoid giving state law "an interpretation that necessitates preempting part of the state statute").

### A. Under the Elections Clause, Congress has broad power to preempt state law.

When it passed HAVA, Congress explicitly stated that it was exercising its authority under the Elections Clause to enact significant reform of elections for federal offices. H.R. Rep. 107-329, pt. 1 at 57 (2001) ("CONSTITUTIONAL AUTHORITY … [T]he Committee states that Article I, Section 4 of the U.S. Constitution grants Congress the authority to make laws governing the time, place and manner of holding Federal elections.").[3]

The Elections Clause provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. "The substantive scope of the Elections Clause is vast—the Supreme Court has found the 'time, place, and manner' of federal elections to be 'comprehensive words' that 'provide a complete code for congressional elections'" regarding all the "procedure and safeguards" necessary to conduct elections. *Tex. Voters All. v. Dallas*

[3] In its brief on this appeal, the State appears to argue that Congress exercised its Spending Clause authority in enacting HAVA, State Br. at 32, but that is wrong: Congress explicitly stated that HAVA was Elections Clause legislation. H.R. Rep. 107-329, pt. 1 at 57 (2001).

*Cnty.*, 495 F. Supp. 3d 441, 467 (E.D. Tex. 2020) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

Because Congress enacted HAVA pursuant to its Elections Clause authority, preemption principles under the Elections Clause—not the Supremacy Clause, U.S. CONST. art. VI, cl. 2—are the proper starting point. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 7-15 (2013); *Illinois Conservative Union v. Illinois*, 2021 WL 2206159, at *6 (N.D. Ill. June 1, 2021); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 730 (S.D. Miss. 2014). The most critical difference between these two preemption principles is that "[t]he assumption that Congress is reluctant to pre-empt does not hold when Congress acts" under the Elections Clause. *Inter Tribal Council of Ariz.*, 570 U.S. at 14; *see also League of Women Voters of Ind., Inc. v. Sullivan*, ___ F.4th ___ , 2021 WL 3028816, at *6 (7th Cir. July 19, 2021) ("But voting cases are different: no such presumption [against preemption] applies …."). Indeed, when Congress enacts legislation pursuant to the Elections Clause, "it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *Inter Tribal Council of Ariz.*, 570 U.S. at 14; *see also Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1195 (10th Cir. 2014) ("[W]hen Congress acts pursuant to the Elections Clause, courts should not assume reluctance to preempt state law.").

This distinction flows from the "special role" that the Constitution assigns to Congress "in protecting the integrity of the democratic process in federal elections." *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 567 n.2 (2013) (Ginsberg, J, dissenting). The Elections Clause "invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997) (internal citations omitted). "Thus it is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Id*. (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995)).

Federal law under the Elections Clause preempts all state laws that are "inconsistent with" the federal regime. *Inter Tribal Council of Ariz.*, 570 U.S. at 15; *see also Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) ("[T]he state system cannot directly conflict with federal election laws on the subject."). States may "regulate the incidents" of federal elections "only within the exclusive delegation of power under the Elections Clause." *Cook v. Gralike*, 531 U.S. 510, 523 (2001); *see* also *Ex parte Siebold*, 100 U.S. 371, 384 (1879) (Elections Clause legislation, "so far as it extends and conflicts with the regulations of the State, necessarily supersedes them"). In determining whether state law is preempted under the Elections Clause, a court must "straightforwardly and naturally read the federal

and state provisions in question as though part of a unitary system of federal election regulation but with federal law prevailing over state law where conflicts arise." *Fish v. Schwab*, 957 F.3d 1105, 1137 (10th Cir. 2020).

### B. HAVA preempts the appellate court's construction of Texas law.

The appellate court construed Texas's "illegal voting" law to criminalize the casting of a provisional ballot by an individual, such as Ms. Mason, who acts in good faith and with no intent to defraud but is ultimately mistaken about her eligibility to vote. In doing so, the court imposed a penalty for casting a provisional ballot that is squarely inconsistent with HAVA.

In Texas, a person commits the offense of illegal voting if she "votes or attempts to vote in an election in which the person knows the person is not eligible to vote." TEX. ELEC. CODE § 64.012(a)(1). The appellate court found that "[t]he evidence does not show that [Mason] voted for any fraudulent purpose." *Mason*, 598 S.W.3d at 779. Nonetheless, the court determined that Ms. Mason committed the crime of illegal voting under Texas law because she "knew she was on supervised release when she" cast her ballot. *Id*.; *see also id*. at 768 ("the State d[id] not have to prove that the defendant subjectively knew that voting with that condition made the defendant ineligible to vote under the law or that to vote while having that ineligibility is a crime"). This construction imposes draconian penalties for the exercise of a federal right, threatens to chill participation in the electoral process by

many thousands of would-be provisional voters, and directly conflicts with HAVA. It is therefore preempted.

HAVA establishes a federal right to cast a provisional ballot. 52 U.S.C. § 21082(a). Indeed, the "rights-creating language" of the provisional ballot provision is "unambiguous." *Sandusky*, 387 F.3d at 572. HAVA also provides the consequences when an individual is wrong about her eligibility to vote: the provisional ballot will not be counted. 52 U.S.C. § 21082(a)(4). If Congress in HAVA intended to criminalize the act of casting a provisional ballot based on an incorrect belief that a voter is eligible, it easily could have done so. But it did not, and that decision must be given effect.

Further, permitting Texas to impose its state law penalties on an individual for the exercise of her federal right unquestionably frustrates the statutory scheme and purpose of HAVA. *See Voter Integrity Project*, 199 F.3d at 777 (examining intent of federal election statutes to determine if state regulations were preempted). As discussed, HAVA was enacted to fix the broken electoral system exposed by the 2000 presidential election. In that election, millions of voters were turned away from the polls on election day because their names did not appear on the voter rolls.[4]

[4] *See Hearing on Oversight of HAVA Implementation: Hearing Before the Comm. on H. Admin.*, 109th Cong. 4 (2005) ("According to the 2001 MIT CAL-TECH study, 3 million voters were turned away from the polls without casting a vote on Election Day 2000."), available at https:govinfo.gov/conent/pkg/CHRG-109hhrg26991/html/CHRG-109hhrg26991.html.

Recognizing the threat to the integrity of the democratic process caused by such widespread disenfranchisement, Congress agreed that States should be required to implement robust provisional balloting systems. That way, an individual who believes she is eligible to vote will not be turned away from the polls simply because she is not on a list of eligible voters, even if she is ultimately incorrect in her belief that she was an eligible voter.

The threat of serious criminal sanctions posed by the appellate court's interpretation of Texas law will unquestionably chill individuals who would otherwise submit a provisional ballot. No matter how strongly they believe that they are eligible to vote, many individuals will not risk being wrong about their eligibility, which might then subject them to criminal prosecution and, potentially, a sentence of five years in prison. Instead, upon learning that they are not on the voter list, those individuals will simply leave the polling place without casting a ballot. In other words, the threat of extremely serious criminal sanctions makes the provisional balloting procedures mandated by HAVA an illusion at best, and a trap at worst.

### C. The appellate court and the State misapplied relevant principles.

In rejecting Elections Clause preemption, the appellate court concluded that nothing in the National Voter Registration Act of 1993 ("NVRA") or HAVA "expressly preempts a state from imposing criminal liability for a person's voting, regularly or provisionally, while ineligible." *Mason*, 598 S.W.3d at 782. But under

Elections Clause preemption principles, Congress does not have to expressly state its intent to preempt state laws. The proper question is whether it is "inconsistent" with HAVA to impose severe criminal penalties on an individual who, with no intent to defraud, was simply incorrect about her eligibility to vote. *See Inter Tribal Council of Ariz.*, 570 U.S. at 15. Because HAVA is meant to *encourage* individuals to cast a provisional ballot if they are not on the voter list but believe they are eligible to vote, the imposition of criminal penalties for doing what Congress intended is clearly inconsistent with the federal law.

### 1. The federal election laws do not criminalize casting a provisional ballot based on a good-faith but mistaken belief that the individual is an eligible voter.

The appellate court stated that "HAVA expressly requires a provisional voter to affirm that the voter is both registered and eligible under state law—thus placing that person at risk of federal and state criminal liability if the information is false." *Mason*, 598 S.W.3d at 783. This is not true. The two federal provisions the court cited were 52 U.S.C. § 21082(a), which requires an individual to submit a written affirmation that she is an eligible voter, and 52 U.S.C. § 20511(2), which is a provision of the NVRA that provides for criminal penalties for a person who "knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by … casting … ballots that are known by the person to be materially false, fictitious, or fraudulent

under the laws of the State in which the election is held." Here, the appellate court found that Mason did *not* intend to defraud the State, *Mason*, 598 S.W.3d at 779, so she certainly did not meet the scienter requirement of the federal law. *See U.S. v. Prude*, 489 F.3d 873, 881-83 (7th Cir. 2007) (upholding a jury instruction for a prosecution under § 20511(2) that stated, in part, "the Government must prove beyond a reasonable doubt that the Defendant acted with intent to defraud the residents of Wisconsin of a fair and impartially conducted election process").

Further, a defendant prosecuted under § 20511(2) is entitled to raise and receive a jury instruction on a good faith defense. *Id*. at 882. This defense makes clear that the "knowledge" requirement of the federal law "means that the defendant realized what she was doing, was aware of the nature of her conduct, and did not act through ignorance, mistake, or accident." *Id*.[5] The appellate court refused to read any of those elements into the Texas law, so a prosecution under that law (as interpreted by the appellate court) is inconsistent with the federal penalty and is preempted.

[5] Regardless of whether Ms. Mason raised a defense to the Texas prosecution based on good faith or mistake, the Seventh Circuit's discussion makes clear that an individual who did not *intend to defraud* the electorate by casting a provisional ballot is not subject to prosecution. Reading Texas law to permit such prosecution is inconsistent with HAVA and preempted.

### 2. The State misunderstands the federal right to cast a provisional ballot.

The State claims that HAVA "is an administrative statute, outlining requirements for membership in a spending program," that "has no provisions establishing any remedy for the casting of a provisional ballot by a legally ineligible voter, or any other crime." State Br. at 34. However, the view that HAVA's provisional balloting provision is "administrative" and not "rights-creating" runs against the history, context, and plain text of HAVA. As the Sixth Circuit declared in *Sandusky*, "[t]he rights-creating language of HAVA § 302(a)(2) is unambiguous. That section states that upon making the required affirmation, an '*individual shall be permitted* to cast a provisional ballot.'" 387 F.3d at 572 (quoting 52 U.S.C. § 21082(a)(2)).

The State also contends that *Sandusky* "clarified that, though the enactment of HAVA affects the administration of elections, it leaves the enforcement of voting laws to the states." State Br. at 34. The State misunderstands the relevance and context of that case. The question in *Sandusky* was whether a provisional ballot must be cast in the voter's correct precinct, as required by state law. The Sixth Circuit explained that "the whole point of provisional ballots is to allow a ballot to be cast by a voter who claims to be eligible to cast a regular ballot, pending determination of that eligibility." *Sandusky*, 387 F.3d at 576. The court continued: "HAVA is quintessentially about being able to *cast* a provisional ballot. No one should be

'turned away' from the polls, but the ultimate legality of the vote cast provisionally is generally a matter of state law." *Id*. By the "legality of the vote," the court clearly meant whether the vote would count because the individual was eligible to vote under state law and cast the ballot in the correct place—not whether the State could *criminalize* the good-faith submission of a provisional ballot in the mistaken belief that the person casting the ballot is eligible. In fact, the court explained what the consequence is under the statute when a voter is wrong about their eligibility: "But the voter casts a provisional ballot at the peril of not being eligible to vote under state law; *if the voter is not eligible, the vote will then not be counted*." *Id*. (emphasis added). That is precisely what happened here.

The State asserts that it "can punish an ineligible voter who cast a provisional ballot without running afoul of HAVA," State Br. 34-35. But the State makes its argument without applying the correct Elections Clause preemption analysis, and relies on *Sandusky*, which, as shown, does not provide any support for the State's position. Under the proper test, the appellate court's construction of the Texas statute is preempted by HAVA.

## CONCLUSION

For these reasons, *amici* urge this Court to reverse the judgment of the trial court and vacate Crystal Mason's conviction and sentence.

Dated: August 12, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R App. P. 9.4(i)(3), the undersigned hereby certifies that this Brief of *Amici Curiae* Election Law Scholars in Support of Appellant Crystal Mason complies with the applicable word-count limitation because it contains 6,245 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1). In making this certification, the undersigned has relied on the word-count function of Microsoft Office 365, which was used to prepare the Brief of *Amici Curiae*.

*/s/ Charles Kelley*
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I certify that, on August 12, 2021, I filed the attached document with the Clerk of the Court using the Court's ECF system. I hereby certify that a true and correct copy of this Brief has been served on all counsel of record via e-service:

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